

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Docket No. EPCRA-08-2003-0004

IN THE MATTER OF:)	
)	
)	
Dakota Country Cheese)	COMPLAINT AND NOTICE OF
305 Bis Man Avenue)	OPPORTUNITY FOR HEARING
Mandan, ND 58554)	
)	
Respondent)	
)	
)	

ADMINISTRATIVE COMPLAINT

JURISDICTION

1. This civil administrative enforcement action ("Complaint") is authorized by Congress in section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045, also known as the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"). EPA regulations authorized by the statute are set out in part 372 of Title 40 of the Code of Federal Regulations. The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Rules of Practice")," 40 CFR part 22, a copy of which is enclosed.

2. The undersigned EPA officials have been properly delegated the authority to issue this action.

3. EPA alleges that Respondent has violated sections 312 and 313 of EPCRA, U.S.C. § 11022 and § 11023, and proposes the assessment of a civil penalty as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact alleged

by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

5. To disagree with the complaint, and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk, 999 18th St., Suite 300, Denver, Colorado 80202-2466, within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in your answer.

FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.

QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the specific penalty proposed in this complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of Respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process. If Respondent chooses to resolve this proceeding by paying the specific penalty proposed in this complaint, payment must be made, within thirty (30) calendar days of receipt of this complaint, by sending a certified or cashier's check payable to "Treasurer, United States of America," in care of:

U. S. EPA, Region 8
(Regional Hearing Clerk)
Mellon Bank
P. O. Box 360859M
Pittsburgh, PA 15251

as follows: a copy of the check must be mailed simultaneously to the attorney listed below.

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to

pursue the possibility of settling this matter, or have any other questions, contact Dana J. Stotsky at 1-800-227-9441, extension 6905; or the address below. **Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

GENERAL ALLEGATIONS

1. Section 312 of EPCRA, 42 U.S.C. §11022, requires regulated parties that store chemicals in excess of established threshold amounts file and submit to designated state and local offices annual inventory reports ("Tier II's").
2. Section 313 of EPCRA, 42 U.S.C. §§ 11023, requires companies that manufacture, process, or otherwise use toxic chemicals on the Section 313 list to file annual reports ("Form Rs") that quantify releases and transfers into various environmental media of each individual chemical on the Section 313 list.
3. Respondent is Dakota Country Cheese located at 305 Bis Man Avenue in Mandan, North Dakota.
4. Respondent is a "person" as that term is defined by section 329(7) of EPCRA, 42 U.S.C. § 11049(7).
5. Respondent is an owner or operator of a "facility" as that term is defined in section 329(4) of EPCRA, 42 U.S.C. § 11049(4).
6. The term "**Manufacture**" is defined at 40 C.F.R. § 372.3 to mean to produce, prepare, import or compound a toxic chemical. Manufacture also applies to a toxic chemical that is produced coincidentally during the manufacture, processing, use, or disposal of another chemical or mixture of chemicals.
7. The phrase "**Otherwise Use or Use**" is defined at 40 C.F.R. § 372.3 to mean any use of a toxic chemical that is not covered by the terms manufacture or process and includes use of a toxic chemical contained in a mixture or trade name product.
8. On December 3, 2002, EPA inspected the facility owned by the Respondent to determine compliance with sections 312 and 313 of EPCRA, U.S.C. § 11022 and § 11023.

9. This complaint alleges that Respondent failed to file reports as required under Sections 312 and 313 of EPCRA, 42 U.S.C. § 11022 and § 11023.
10. All allegations above are incorporated by this reference as if fully set forth in the following counts.

COUNT 1

11. Alkali 90, Microlox Special 70LF, nitric acid (CAS number 7697-37-2), anhydrous ammonia (CAS number 7664-41-7), and propane (CAS number 74-98-6) are hazardous chemicals as defined by 29 C.F.R. § 1910.1200(c).
12. At all times relevant to this Complaint, the facility was required to prepare or have available a material safety data sheet ("MSDS") for each hazardous chemical used and stored at the facility. This requirement is found under the Occupational Safety and Health Act of 1970 and the regulations promulgated under that Act.
13. Respondent, as a facility, is required to file a Tier II inventory report for hazardous chemicals it stored in excess of established thresholds. Such thresholds are located at 40 CFR 370.20(b).
14. Respondent failed to file a Tier II inventory report for reporting year 2002 for five hazardous chemicals it stored in excess of established thresholds. The five hazardous chemicals are Alkali 90, Microlox Special 70LF, nitric acid, anhydrous ammonia, and propane.
15. Respondent's failure to file a Tier II inventory report for the five hazardous chemicals cited in paragraph no. 11 above constitutes a violation of Section 312 of EPCRA, 42 U.S.C. § 11022.

COUNTS 2,3, and 4

16. Nitric acid is toxic chemical listed under 40 C.F.R. § 372.65.
17. Facilities using nitric acid are required to report, via a Form R, when such uses during a calendar year are in excess of threshold amounts as set forth in 40 C.F.R. § 372.25(b).

18. Nitric acid was used at the Respondent's facility during calendar years 2000, 2001, and 2002, in excess of threshold amounts for nitric acid, as set forth in 40 C.F.R. § 372.25(b).
19. Respondent failed to file a Form "R" report for nitric acid by the reporting deadline for each calendar year 2000, 2001, and 2002.
20. Respondent's failure to file a Form "R" report for nitric acid used or otherwise used in 2000, 2001, and 2002, constitutes three separate violations of Section 313 of EPCRA.

COUNTS 5,6, and 7

21. Nitrate compounds are toxic chemicals, and are listed as an EPCRA §313 Toxic Chemical Category under 40 C.F.R. § 372.65(c).
22. Nitrate compounds used or manufactured in excess of threshold amounts during a calendar year must be reported to designated EPA offices.
23. Nitrate compounds were manufactured at Respondent's facility during calendar years 2000, 2001, and 2002 in excess of threshold amounts for those chemicals set forth in 40 C.F.R. § 372.25(a).
24. Respondent failed to file a Form "R" report for nitrate compounds manufactured in calendar years 2000, 2001, and 2002.
25. Respondent's failure to file a Form "R" report for nitrate compounds manufactured in 2000, 2001, and 2002, constitutes three separate violations of Section 313.

PROPOSED CIVIL PENALTY

Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c), as amended, authorizes EPA to assess a civil penalty of \$27,500 for each violation of section 312. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), as amended, authorizes EPA to assess a civil penalty of up to \$27,500 per day for each violation of section 313.

Based upon the violations cited in this Complaint, and, to the extent known, upon the nature, circumstances, extent and gravity of the violations alleged, Respondent's history of prior violations of EPCRA, and degree of culpability, as set forth in two separate enforcement policies. The first is the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-To-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)," dated August 10, 1992, (enclosed as Complainant's Exhibit #1). The second is the "Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act" dated September 30, 1999 (enclosed as Complainant's Exhibit #2). EPA proposes to assess the following civil penalty for each of the violations described above:

COUNT	VIOLATION	PROPOSED PENALTY
	Failure to submit Tier II for Microlox Special 70LF, Alkali 90, nitric acid, ammonia and propane stored and used in 2002	<u>\$17,188</u>
	Failure to submit Form R's for nitric acid used in 2000	<u>\$5,500</u>
	Failure to submit Form R's for nitric acid used in 2001	<u>\$5,500</u>
	Failure to submit Form R's for nitric acid used in 2002	<u>\$5,500</u>
	Failure to submit Form R's for nitrate compounds manufactured in 2000	<u>\$5,500</u>
	Failure to submit Form R's for nitrate compounds manufactured in 2001	<u>\$5,500</u>
	Failure to submit Form R's for nitrate compounds manufactured in 2002	<u>\$5,500</u>
	25% upward adjustment for Past History of Violations	<u>\$8,250</u>
TOTAL PROPOSED PENALTY		<u>\$58,438</u>

The reasoning behind the proposed penalty in this matter is detailed in the penalty calculation narrative and worksheet, incorporated herein by reference and enclosed as Complainant's Exhibit 3.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

Date: 9-26-03 By: David J. Janik
Michael T. Risner, Director
David Janik, Supervisory Attorney
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Date: 9/25/03 By: SIGNED
Martin Hestmark, Director
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Date: Sept. 25, 2003 By: SIGNED
Dana Stotsky, Enforcement Attorney
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

IN THE MATTER OF: DAKOTA COUNTRY CHEESE
DOCKET NUMBER : EPCRA-08-2003-0004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and a true copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING dated September 30, 2003 was hand-carried to the Regional Hearing Clerk, EPA, Region VIII, 999 18th Street, Denver, Colorado 80202-2466, and that true copy of the same was sent by certified mail, return receipt requested to:

Virgil A. Johnson
Registered Agent for
Dakota Country Cheese
305 Bis-Man Avenue
Mandan, North Dakota 58554

9/30/03

Date

Signed

Judith M. Mc Ternan

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON SEPTEMBER 30, 2003.